



STATE OF NEW MEXICO RETAIL AND HOSPITALITY COMPENDIUM OF LAW

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RETAIL GUIDE TO NEW MEXICO PREMISES LIABILITY

I.	Introduction	5
II.	New Mexico Court System.....	5
	a. The New Mexico State Court System	5
	1. Judicial Selection	5
	2. Structure	6
	1. Magistrate Courts	6
	2. Metropolitan Court.....	6
	3. District Courts	6
	4. New Mexico Court of Appeals	6
	5. New Mexico Supreme Court.....	6
	b. The United States District Court for the District of New Mexico	6
III.	Negligence.....	7
	a. General Negligence Principles	7
	1. Joint and Several Liability.....	7
	1. Definition	7
	2. Applicability.....	7
	2. Comparative Fault/Contributory Negligence	8
	3. Strict Liability	9
	1. Product liability	9
	2. Learned intermediary	9
	4. Assumption of Risk.....	9
	b. Governmental Liability.....	9
	c. Landowner Liability	9
	1. Notice	10
	2. Liquor	10
	3. The “baseball rule”	10
	d. Trespass	11
	1. Trespasser - Definition	11
	2. Duty to Trespasser - Artificial Condition on Premises	12
	3. Duty to Trespasser - Activity of Owner	12
	4. Duty to Trespasser - Natural Conditions.....	13
	5. Trespassing Children (Attractive Nuisance).....	13
IV.	Specific Examples of Negligence Claims	13
	a. “Slip and Fall” Cases.....	13
	1. Snow and Ice - Natural Accumulation	14
	2. Slippery Surfaces.....	14
	3. Defenses.....	14
	b. Off Premises Hazards	14
	c. Liability for Violent Crime	15
	1. Tavern Keepers Liability for Violent Crime	15

	2.	Defenses.....	16
d.		Claims Arising from the Wrongful Prevention of Thefts	16
	1.	False Imprisonment	16
	2.	Malicious Prosecution and Abuse of Process	16
	3.	Defamation	16
	4.	Negligent Hiring, Retention, or Supervision of Employees	17
	5.	Shopkeeper Immunity.....	17
	6.	Food Poisoning.....	18
e.		Construction-Related Accidents	18
V.		Indemnification and Insurance Procurement Agreements	18
	a.	Indemnification	18
	1.	Traditional Indemnification	18
		1. "Active" and "Passive" Conduct.....	19
	2.	Proportional Indemnification	19
	b.	Insurance Procurement Agreements.....	20
	c.	Duty to Defend.....	20
VI.		Damages.....	20
	a.	Compensatory Damages	21
	1.	Calculation of Damages	21
		1. Past and Future Medical Bills.....	21
		2. Loss of Enjoyment of Life	21
		3. Loss of Services of Spouse	21
		4. Increased Risk of harm.....	21
		5. Disfigurement	22
		6. Disability.....	21
		7. Past and Future Pain and Suffering	22
		8. Loss of Society.....	22
		9. Lost Income, Wages, Earnings	22
		10. Non-medical Expenses.....	22
		11. Damages to Personal Property	22
		12. Loss of Use of Personal Property	22
		13. Damages to Real Property	23
		14. Repair and Remediation of Real Property	23
		15. Aggravation of Preexisting Condition.....	23
		16. Loss of Earning Capacity by a Minor.....	24
	b.	Collateral Source	24
	1.	General Principal.....	24
	2.	Applicability.....	24
	c.	Medical Damages.....	24
	d.	Nominal Damages	25
	e.	Punitive Damages	25
	1.	Standard.....	25
	2.	Insurability	25

3.	Caps.....	26
f.	Wrongful Death and Survivorship Actions.....	26
1.	Wrongful Death Actions.....	26
1.	Standard.....	26
2.	Elements of damages.....	26
2.	Survivorship Actions.....	27

I. Introduction. This Compendium outline contains a brief overview of certain laws concerning various topics relating to retail issues under New Mexico law. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.

II. New Mexico Court Systems

a. The New Mexico State Court System.

1. Judicial Selection. In New Mexico, judges may be selected either by election or by gubernatorial appointment. In the latter case, typically arising when a vacancy exists on the court or a new judicial position is created, the Governor appoints the judge from a list of candidates recommended to her by a bi-partisan judicial selection committee (whose membership is composed of judges; a lawyer and non-lawyer appointed by the governor; the speaker of the house of representatives; the president pro tempore of the senate; the dean of the University of New Mexico law school; and four lawyers appointed jointly by the president of the state bar and the judge members of the

commission.). A judge appointed to the bench is required to stand for election in the first contested election after his or her appointment.¹

2. Structure. Apart from probate courts and municipal courts, New Mexico has five levels of courts.

1. **Magistrate Courts.** Magistrate Courts are courts of limited jurisdiction, in all counties except Bernalillo County. Magistrate Court judges are not required to be lawyers, except in magistrate districts with populations over 200,000. These courts typically handle misdemeanor and traffic cases, along with small civil cases.²
2. **Metropolitan Court.** The Metropolitan Court is the court of limited jurisdiction for Bernalillo County, New Mexico (where Albuquerque is located). The Metropolitan Court judges are required to be lawyers. The Metropolitan Court handles misdemeanors and traffic cases along with small civil cases.³
3. **District Courts.** District Courts are the courts of general jurisdiction.⁴
4. **New Mexico Court of Appeals.** The New Mexico Court of Appeals is the intermediate appellate court for the State.⁵
5. **New Mexico Supreme Court.** The New Mexico Supreme Court is the ultimate appellate court for New Mexico.⁶

¹ See generally *Methods of Judicial Selection: New Mexico*, NAT'L CTR. FOR STATE COURTS (Mar. 11, 2020), , http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=NM.

² See generally *About the Courts*, NEW MEXICO COURTS (Mar. 11, 2020), <https://www.nmcourts.gov/court-administration/about-the-courts/> ; NMSA 1978, § 35-2-1 (2015).

³ See generally *About the Courts*, NEW MEXICO COURTS (Mar. 11, 2020), <https://www.nmcourts.gov/court-administration/about-the-courts/> ; NMSA 1978, § 34-8A-4 (1993).

⁴ See generally *About the Courts*, NEW MEXICO COURTS (Mar. 11, 2020), <https://www.nmcourts.gov/court-administration/about-the-courts/>

⁵ See generally *About the Courts*, NEW MEXICO COURTS (Mar. 11, 2020), <https://www.nmcourts.gov/court-administration/about-the-courts/>

⁶ See generally *About the Courts*, NEW MEXICO COURTS (Mar. 11, 2020), <https://www.nmcourts.gov/court-administration/about-the-courts/>

b. The United States District Court for the District of New Mexico. The entirety of New Mexico comprises one federal judicial district, the District of New Mexico. Appeals from the United States District Court for the District of New Mexico are taken to the United States Court of Appeals for the 10th Circuit.⁷

III. Negligence

a. General Negligence Principles. “The term “negligence” may relate either to an act or a failure to act.”⁸ In order to make a prima facie showing of a claim for negligence, a plaintiff must show: “(1) the existence of a duty running from the defendant to the plaintiff; (2) a breach of that duty based on a reasonable care standard; and (3) the breach of duty is both the proximate and in-fact cause of the plaintiff's damages.”⁹ The initial determination of whether a duty is owed is “a question of law to be determined by the court,” which can be based in statute or common law.¹⁰ A duty based in common law is determined by public policy.¹¹ In New Mexico, foreseeability is not considered in a duty determination, but is rather a question to be answered by the trier of fact in determining whether or not a duty was breached.¹² This approach is consistent with the approach of the Restatement (Third) of Torts.¹³

1. Joint and Several Liability.

1. Definition. “Under the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault, leaving it to the defendants to sort out among themselves individual responsibility based on theories of proportional indemnification or contribution.”¹⁴

⁷ See generally *General Information*, UNITED STATES DISTRICT COURT DISTRICT OF NEW MEXICO (MAR. 11, 2020), <http://www.nmd.uscourts.gov/general-information-1>.

⁸ UJI 13-1601 NMRA.

⁹ *Ross v. City of Las Cruces*, 2010-NMCA-015, ¶ 10, 148 N.M. 81, 229 P.3d 1253; see also UJI 13-305 NMRA.

¹⁰ *Ross*, 2010-NMCA-015, ¶ 10.

¹¹ See *Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶¶ 1,16, 326 P.3d 465.

¹² See *id.* ¶¶ 4, 25.

¹³ See *id.* ¶¶ 1, 8-11.

¹⁴ *Payne v. Hall*, 2006-NMSC-029, ¶ 11, 139 N.M. 659, 137 P.3d 599.

2. Applicability. New Mexico has, by and large, eliminated the doctrine of joint and several liability; however, there are statutory exceptions to this, as set forth in NMSA 1978, Section 41-3A-1(C) (1987). Joint and several liability continues to apply:

- a. “to any person or persons who acted with the intention of inflicting injury or damage;
- b. to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
- c. to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
- d. to situations not covered by any of the foregoing and having a sound basis in public policy.”¹⁵

2. Comparative Fault/Contributory Negligence. New Mexico has adopted a system of pure comparative fault.¹⁶ “With [this adoption] and the directive that the jury find and compare the negligence of all who may have contributed to an injury, the label of ‘contributory negligence’ has lost its significance. It may be confusing to label the negligence of the plaintiff as ‘contributory negligence’ while referring to the contributing conduct of the defendant or others simply as ‘negligence.’ The elimination of ‘contributory negligence’ is further accomplished by changes in UJI 13-302 NMRA. A defendant who asserts the contributory negligence of the plaintiff as a reduction of

¹⁵ NMSA 1978, § 41-3A-1(C) (1987).

¹⁶ See *Scott v. Rizzo*, 1981-NMSC-021, ¶ 30, 96 N.M. 682, 634 P.2d 1234, *superseded in part by statute*, NMSA 1978, § 41-3A-1 (1987), *as recognized in Reichert v. Atler*, 1992-NMCA-134, ¶ 34, 117 N.M. 628, 875 P.2d 384.

recoverable damages raises the defense of 'plaintiff's negligence' rather than 'plaintiff's contributory negligence.'"¹⁷

3. Strict Liability.

1. **Product liability.** New Mexico has adopted strict liability in product liability actions.¹⁸
2. **Learned intermediary.** The New Mexico Court of Appeals has adopted a learned intermediary doctrine relating to the sale of prescription pharmaceuticals and devices (although without using the term "learned intermediary").¹⁹ However, the Supreme Court has yet to rule on this issue, and it has been predicted by a New Mexico federal district court judge that the Supreme Court would refuse the adoption of this doctrine in modern day.²⁰

4. **Assumption of Risk.** Assumption of risk is no longer recognized as a defense in New Mexico.²¹ The doctrine was abolished by the *Williamson* court, which stated that "the ground formerly occupied by the doctrine . . . [would] be covered by the law pertaining to negligence and contributory negligence."²² Since New Mexico now operates under a system of pure comparative fault, the concepts underlying assumption of risk are subject to the comparative negligence analysis.²³

¹⁷ Committee commentary to UJI 13-1602 NMRA (pursuant to a court order UJI 13-602, relating to contributory negligence, was withdrawn effective October 1, 1984).

¹⁸ See *Stang v. Hertz Corp.*, 1972-NMSC-031, ¶¶ 22-25, 83 N.M. 730, 497 P.2d 732.

¹⁹ See *Perfetti v. McGhan Med.*, 1983-NMCA-032, ¶¶ 15, 20, 99 N.M. 645, 662 P.2d 646.

²⁰ See *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1214 (D.N.M. 2008) (stating that "[t]he Court believes that the Supreme Court of New Mexico would not, in 2008, adopt the doctrine of learned-intermediary and would decline to follow the Court of Appeals cases from the 1970s and 1980s"); but see *Norwell v. Medtronic, Inc.*, 372 F.Supp.3d 1166, 1254 at n. 25 (D.N.M. 2019) ("Although the Court remains unconvinced that the Supreme Court of New Mexico would adopt the [learned-intermediary] doctrine whole cloth, the Court predicts that the Supreme Court of New Mexico would adopt the doctrine as applied to surgically implanted medical devices").

²¹ See *Williamson v. Smith*, 1971-NMSC-123, ¶ 29, 83 N.M. 336, 491 P.2d 1147.

²² *Id.*

²³ See *Scott*, 1981-NMSC-021, ¶ 17.

- b. Governmental Liability.** “In general, the state is immune from tort suits. The exceptions to this rule are the specific waivers of immunity contained in the [New Mexico Torts Claims Act].”²⁴ “In enacting the [Torts Claims Act], the Legislature expressed an intent to waive the state's immunity in situations that would subject a private party to liability under our common law.”²⁵
- c. Landowner Liability.** Rather than “hinge liability of a landowner upon whether an entrant upon land is an invitee or a licensee,” as is the case in some states, in New Mexico “the ordinary principles of negligence [] govern a landowner's conduct as to a licensee and invitee. A landowner or occupier of premises must act as a reasonable [person] in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk. This duty of care shall extend to all persons, other than trespassers, who enter property with the defendant's consent, express or implied.”²⁶ “The owner/occupier owes a duty of ordinary care under the circumstances, including the duty to exercise ordinary care to prevent harmful conduct from a third person, even if the third person's conduct is intentional,”²⁷ and “whether or not a dangerous condition is obvious.”²⁸
- 1. Notice.** “New Mexico law imposes a duty on businesses to protect their patrons from the harmful acts of third persons if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron,” whether or not actual notice is proven.²⁹
 - 2. Liquor.** In New Mexico, liquor sale liability is governed by the New Mexico Dram Shop Liability Act.³⁰ “To establish a defendant's liability under the New Mexico Dram Shop Liability Act, a plaintiff must prove

²⁴ *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 9, 310 P.3d 611 (internal citation omitted); *see also* NMSA 1978, § 41-4-4(A) (2001).

²⁵ *Encinias*, 2013-NMSC-045, ¶ 15.

²⁶ *Ford v. Bd. of Cty. Comm'rs of Cty. of Dona Ana*, 1994-NMSC-077, ¶ 12, 118 N.M. 134, 879 P.2d 766.

²⁷ *Rodriguez*, 2014-NMSC-014, ¶ 5 (internal citation omitted).

²⁸ UJI 13-1309 NMRA.

²⁹ *Encinias*, 2013-NMSC-045, ¶ 16 (citing *Coca v. Arceo*, 1962-NMSC-169, ¶ 7, 71 N.M. 186, 376 P.2d 970 (citing II Restatement of Torts § 348 (1934)) (now covered by Restatement (Second) of Torts § 344 (1965))).

³⁰ *See* NMSA 1978, § 41-11-1 (1986).

that the defendant licensee (1) sold or served alcohol to a person who was intoxicated; (2) it was reasonably apparent to the licensee that the [patron] ... was intoxicated; and (3) the licensee knew from the circumstances that the [patron] ... was intoxicated.”³¹

3. The “baseball rule.” The standard duty of ordinary care has been modified with regard to owners/occupiers of commercial baseball stadiums.³² This rule “imposes upon owners/occupiers only a limited duty of care to assure the safety of spectators. Under the baseball rule, the proprietor of the baseball stadium only has a duty (1) to screen the area of the field behind home plate, and (2) to a sufficient extent, to protect those spectators from being struck by a ball leaving the field of play.”³³ This is because of the “unique relationship between the baseball stadium owners/occupiers and their fans, along with the spectators' desire to participate in the game by catching foul balls.”³⁴ New Mexico has determined that this “warranted a modification of the duty to exercise ordinary care.”³⁵ In its place “a baseball stadium's owners/occupiers have a duty to exercise[] ordinary care not to increase the inherent risk of being hit by a projectile leaving the field [of play], which is symmetrically balanced against the spectators' duty to exercise care to protect themselves from the same risk.”³⁶ However, a “stadium owners'/occupiers' duty of ordinary care remain[s] undisturbed for other premises liability claims.”³⁷

d. Trespass.

1. Trespasser – Definition. A trespasser is “a person who enters or remains upon the premises of another without the [express] [or] [implied] permission of the [owner] [occupant] of the premises.”³⁸

³¹ *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶ 6, 274 P.3d 97 (alteration in original) (internal quotation marks omitted) (citing NMSA 1978, § 41-11-1(A) (1986)).

³² See *Rodriguez*, 2014-NMSC-014, ¶ 6.

³³ *Id.* (internal citations omitted).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (citing *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 41, 148 N.M. 646, 241 P.3d 1086) (alterations in original) (internal quotation marks omitted).

³⁷ *Id.*

³⁸ UJI 13-1301 NMRA.

Even if a person has permission to enter and remain upon the premises of another, he or she is a trespasser to the extent that he or she goes outside the area in which the owner of the premises might “reasonably expect” him or her to be.³⁹ A person is also a trespasser to the extent that he or she uses the premises in a manner different from that which the owner might reasonably expect.⁴⁰

2. Duty to Trespasser – Artificial Condition on Premises. The owner of the premises owes no duty to make his or her premises safe for trespassers, unless and until he or she “knows or reasonably should know” that the trespasser is on the premises.⁴¹ If this requirement is satisfied, and the owner “creates or maintains an artificial condition on the land,” then the owner has a duty to use ordinary care to warn a trespasser of the condition if:

1. The condition involves an unreasonable risk of death or bodily harm to persons coming onto the land;
2. The owner knows or reasonably should know that there are constant intrusions by persons in the dangerous area, or persons on the land in dangerous proximity to the condition; and
3. The owner has reason to believe that the trespasser will not discover the condition or realize the risk involved.⁴²

3. Duty to Trespasser – Activity of Owner. If an owner is engaged in activities on his or her land, he or she has a duty to use ordinary care to avoid injury to a trespasser if:

1. The activity involves an “unreasonable risk of death or great bodily harm” to persons coming onto the land;

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ UJI 13-1305 NMRA.

⁴² *Id.*

2. The owner “knows or should reasonably know that [there are constant intrusions by trespassers onto the area in which the activity is permitted] [there are trespassers on the land in dangerous proximity to the activity]; and”
3. The owner “has reason to believe that the trespasser will not realize the risk of harm involved.”⁴³

4. Duty to Trespasser – Natural Conditions. A landowner has no liability to a trespasser injured on his or her land from a natural condition of that land.⁴⁴

5. Trespassing Children (Attractive Nuisance). A landowner has a duty to prevent injury to a trespassing child resulting from an artificial condition of the land if:

1. The place where the condition is maintained is one upon which the owner knows or has reason to know that children are likely to trespass;
2. The condition involves an unreasonable risk of injury to trespassing children and the landowner has reason to know of such risk; and
3. The child, because of his or her youth, does not discover the condition or realize the risk involved by intermeddling with it or coming into the area made dangerous by it.⁴⁵

IV. Specific Examples of Negligence Claims

- a. **“Slip and Fall” Cases.** In “slip and fall” cases involving visitors, a landowner or occupant owes the visitor the duty to exercise ordinary care to keep the premises safe for the visitor’s use.⁴⁶ This duty applies whether or not the

⁴³ UJI 13-1306 NMRA.

⁴⁴ UJI 13-1307 NMRA.

⁴⁵ UJI 13-1312 NMRA.

⁴⁶ UJI 13-1318 NMRA.

dangerous condition on the premises is obvious.⁴⁷ In performing the duty, the landowner or occupant is charged with the knowledge of any condition on the premises that he or she would have had knowledge of if he or she had made a reasonable inspection of the premises, along with any condition which was caused by the landowner or his or her employees.⁴⁸

1. Snow and Ice – Natural Accumulation. A “slip and fall” case dealing with snow and ice is dependent on the facts of the case.⁴⁹ The determination depends on whether or not the probability of harm is unreasonably great and whether it was feasible for defendant to eliminate the danger.⁵⁰ Contributory negligence is also considered.⁵¹

2. Slippery Surfaces. “The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence, for this condition may arise temporarily in any place of business. Nor does proof of a slippery floor, without more, give rise to an inference that the proprietor had knowledge of the condition.”⁵² Rather, a business owner is “liable for physical harm caused to his invitees by a condition on his premises, if, but only if, he: (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.”⁵³

3. Defenses. Although New Mexico has eliminated the doctrine of assumption of risk, comparative negligence can still be used as a defense in a “slip and fall” case.⁵⁴

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See Proctor v. Waxler*, 1972-NMSC-057, ¶¶ 10-13, 84 N.M. 361, 503 P.2d 644.

⁵⁰ *See id.* ¶ 10.

⁵¹ *See id.* ¶ 10.

⁵² *Garcia v. Barber's Super Mkts., Inc.*, 1969-NMCA-126, ¶ 11, 81 N.M. 92, 463 P.2d 516 (internal citation omitted).

⁵³ *Williamson v. Piggly Wiggly Shop Rite Foods, Inc.*, 1969-NMCA-088, ¶¶ 5-6, 80 N.M. 591, 458 P.2d 843 (internal quotation marks omitted) (citing Restatement (Second) of Torts § 343 (1965)).

⁵⁴ *See* directions for use to UJI 13-1601 NMRA (stating that “[t]he negligence of all parties whose negligence is to be compared--plaintiff, defendant, other parties or absent persons--is defined by this single instruction”).

- b. Off Premises Hazards.** While not unlimited, a landowner can be found to owe a duty to those who are injured and are not technically on the landowner's premises. "[O]ne who owns or controls property has a duty to refrain from creating or permitting conditions on such property that will foreseeably lead to an unreasonable risk of harm to others beyond the property's borders."⁵⁵
- c. Liability for Violent Crime.** "It is well established that the owner of a business may be liable even for a third party's intentional criminal acts on its premises."⁵⁶ "New Mexico law imposes a duty on businesses to protect their patrons from the harmful acts of third persons if, by the exercise of reasonable care, the proprietor could have discovered that such acts were being done or about to be done, and could have protected against the injury by controlling the conduct of the other patron."⁵⁷

1. Tavern Keepers Liability for Violent Crime. If a tavern keeper has a liquor license from the State, his or her liability for negligent liquor sales or service is governed by NMSA 1978, Section 41-11-1 (1986). If a licensee sells or serves liquor to a person who is intoxicated, the licensee is civilly liable for ensuing damages if it was "reasonably apparent" to the licensee that the person buying or receiving service was intoxicated and the licensee "knew from the circumstances" that the person buying or receiving service was intoxicated.⁵⁸ If the damages are being claimed by the person who received service while intoxicated, the licensee is only liable if he or she is determined to have acted with gross negligence and reckless disregard for the intoxicated person.⁵⁹ There are caps placed on the damages recoverable from licensees, based on the number of people who were injured.

Apart from the claims permitted against licensees under Section 41-11-1, the common law recognizes two types of claims against non-licensee tavern keepers who serve alcohol to intoxicated

⁵⁵ *Stetz v. Skaggs Drug Ctrs., Inc.*, 1992-NMCA-104, ¶ 9, 114 N.M. 465, 840 P.2d 612.

⁵⁶ *Encinias*, 2013-NMSC-045, ¶ 16.

⁵⁷ *Id.* (internal quotation marks omitted) (citing *Coca*, 1962-NMSC-169, ¶ 7.

⁵⁸ § 41-11-1(A)(1)-(3).

⁵⁹ § 41-11-1(B).

patrons.⁶⁰ When a third-party is injured by the intoxicated patron, he or she can recover from the tavern keeper upon traditional negligence principles.⁶¹ If the intoxicated patron is injured, he or she can recover from the tavern keeper by proving that the tavern keeper acted with gross negligence and a reckless disregard for the safety of the patron.⁶²

2. **Defenses.** A property owner “may reduce his liability by the percentage of fault attributable to a third party. This analysis is [] consistent with th[e] Court's adoption of comparative-fault principles . . . and with the rejection of joint and several liability in comparative-fault cases”⁶³ “[T]he jury should be given an instruction regarding the owner's duty to protect patrons and how that duty relates to the conduct of third persons.”⁶⁴ “[T]he owner's negligent failure to protect patrons from foreseeable harm may be compared to the conduct of the third party and that the owner is responsible only for its percentage of fault.”⁶⁵

d. Claims Arising from the Wrongful Prevention of Thefts.

1. **False Imprisonment.** “Under New Mexico law, ‘false imprisonment consists of intentionally confining or restraining another person without his [or her] consent and with knowledge that he [or she] has no lawful authority to do so.’”⁶⁶

2. **Malicious Prosecution and Abuse of Process.** Malicious prosecution and malicious abuse of process are combined into a single tort in New Mexico. The tort, malicious abuse of process, requires: “(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in

⁶⁰ See *Mendoza v. Tamaya Enters.*, 2011-NMSC-030, ¶ 43, 150 N.M. 258, 258 P.3d 1050.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Reichert*, 1994-NMSC-056, ¶ 8.

⁶⁴ *Id.* ¶ 10.

⁶⁵ *Id.* ¶ 11.

⁶⁶ *Romero v. Sanchez*, 1995-NMSC-028, ¶ 13, 119 N.M. 690, 895 P.2d 212 (citing NMSA 1978, § 30-4-3).

the use of process to accomplish an illegitimate end; and (3) damages.”⁶⁷

3. Defamation. New Mexico law defines defamation as “a wrongful [and unprivileged] injury to [a person’s] reputation.”⁶⁸ In defamation actions, the plaintiff has the burden of proving nine contentions: 1) the defendant published the communication; 2) the communication contains a statement of fact; 3) the communication was concerning the plaintiff; 4) the statement of fact was false; 5) the communication was defamatory; 6) the person[s] receiving the communication understood it to be defamatory; 7) the defendant knew that the communication was false or negligently failed to recognize that it was false, or acted with malice; 8) the communication caused actual injury to the plaintiff’s reputation; and 9) the defendant abused his or her privilege to publish the communication.⁶⁹

New Mexico’s defamation doctrine differs from that of the Restatement (Second) of Torts, because it requires the plaintiff to prove an actual injury to his or her reputation.⁷⁰

4. Negligent Hiring, Retention, or Supervision of Employees. Under New Mexico law, negligent hiring, retention, or supervision of employees is based on employers’ negligent acts or omissions when they “know[, or should know, through the exercise of reasonable care, that [an] employee is incompetent or unfit.”⁷¹

For an employer to be liable for damages under a theory of negligent hiring, retention, or supervision of employees, the plaintiff must prove that the particular negligence was the proximate cause of his or her injury.⁷²

⁶⁷ *Durham v. Guest*, 2009-NMSC-007, ¶ 36, 145 N.M. 694, 204 P.3d 19.

⁶⁸ UJI 13-1001 NMRA.

⁶⁹ UJI 13-1002 NMRA.

⁷⁰ *See Smith v. Durden*, 2012-NMSC-010, ¶ 33, 276 P.3d 943.

⁷¹ *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 28, 142 N.M. 583, 168 P.3d 155.

⁷² *See F & T Co. v. Woods*, 1979-NMSC-030, ¶ 11, 92 N.M. 697, 594 P.2d 745; *see also* NMRA 13-1647.

5. Shopkeeper Immunity. In New Mexico, shopkeeper immunity permits merchants to take suspected shoplifters into custody in a reasonable manner for a reasonable time.⁷³ Specifically, New Mexico's reasonable detention statute states that a merchant can detain a person if the merchant has "probable cause for believing that a person has willfully taken possession of any merchandise with the intention of converting it without paying for it, or has willfully concealed merchandise."⁷⁴ The merchant must detain the person in a "reasonable manner" and "for a reasonable time."⁷⁵

New Mexico courts have held that "willfully" in the context of this statute requires more than simply putting the merchandise out of sight.⁷⁶ Instead, "there must also be circumstances which reflect that the purpose of the concealment is adverse to the store owner's right to be paid for the merchandise."⁷⁷

6. Food Poisoning. New Mexico does not have any specific law with regard to food poisoning.

e. Construction-Related Accidents. While normally "an employer is not vicariously liable for the negligence of an independent contractor," there are exceptions to this rule.⁷⁸ Safety matters are considered "in the light of whose work was being performed and who had the right to control that work."⁷⁹ A landowners "duty to provide a safe workplace for employees of a subcontractor depends on the degree of control he exercised over the premises and the details of the work being performed."⁸⁰

V. Indemnification and Insurance Procurement Agreements

a. Indemnification.

⁷³ See NMSA 1978, Section 30-16-23 (1965).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Holguin v. Sally Beauty Supply, Inc.*, 2011-NMCA-100, ¶ 19, 150 N.M. 636, 264 P.3d 732.

⁷⁷ *Id.*

⁷⁸ *Broome v. Byrd*, 1991-NMCA-126, ¶ 3, 113 N.M. 38, 822 P.2d 677.

⁷⁹ *Fresquez v. Sw. Indus. Contractors & Riggers, Inc.*, 1976-NMCA-090, ¶ 7, 89 N.M. 525, 554 P.2d 986.

⁸⁰ *Stinson v. Berry*, 1997-NMCA-076, ¶ 13, 123 N.M. 482, 943 P.2d 129.

1. Traditional Indemnification. Traditional, or equitable, indemnification allows one who has been held liable for damages to be made whole by a third party “such as the primary wrongdoer.”⁸¹ “A right to indemnification is based in equity and may arise without an agreement, by express or implied contract, or by operation of law in order to prevent an unjust result.”⁸² In order for traditional indemnification to apply, there must be an “independent, pre-existing legal relationship between the indemnitee and the indemnitor.”⁸³ New Mexico courts have found traditional indemnification to apply in “negligence and strict liability cases involving persons in the chain of supply of a product, and in breach of warranty cases.”⁸⁴

1. “Active” and “Passive” Conduct. When analyzing a claim for indemnification, New Mexico courts distinguish between “active” and “passive” conduct.⁸⁵ An indemnitee whose conduct was only “passive” may seek indemnification from a party who “actively” caused the harm.⁸⁶ “Passive conduct occurs when the party seeking indemnification fails to discover and remedy a dangerous situation created by the negligence or wrongdoing of another,’ or when a party is only the retailer in the chain of distribution of a defective product.”⁸⁷ Active conduct occurs when the indemnitee “personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty, which the indemnitee had agreed to perform.”⁸⁸

⁸¹ *In re Consol. Vista Hills Retaining Wall Litig.*, 1995-NMSC-020, ¶ 7, 119 N.M. 542, 893 P.2d 438; *but see* NMSA 1978, § 56-7-1 (2005) (stating that indemnification provisions in construction contracts are void in New Mexico).

⁸² *Budget Rent-a-Car Sys., Inc. v. Bridgestone*, 2009-NMCA-013, ¶ 12, 145 N.M. 623, 203 P.3d 154 (citing *Vista Hills*, 1995-NMSC-020, ¶ 8).

⁸³ *Vista Hills*, 1995-NMSC-020, ¶ 8.

⁸⁴ *Id.* ¶ 9 (internal citations omitted).

⁸⁵ *Id.* ¶ 10 (“The purpose of traditional indemnification is to allow a party who has been held liable without active fault to seek recovery from one who was actively at fault.”).

⁸⁶ *See id.* (stating “the right to indemnification involves whether the conduct of the party seeking indemnification was passive and not active or in pari delicto with the indemnitor”).

⁸⁷ *Bridgestone*, 2009-NMCA-013, ¶ 12 (quoting *Vista Hills*, 1995-NMSC-020, ¶ 12).

⁸⁸ *Vista Hills*, 1995-NMSC-020, ¶ 12 (quoting *Schneider Nat’l, Inc. v. Holland Hitch Co.*, 843 P.2d 561 (Wyo. 1992)).

2. Proportional Indemnification. The New Mexico Supreme Court has also adopted the doctrine of proportional indemnification,⁸⁹ a “system of apportioning damages according to relative fault.”⁹⁰ Proportional indemnification applies only in limited circumstances, when “contribution or some other proration of fault among tortfeasors” is not available to a defendant.⁹¹ Proportional indemnification might apply, for example, where the plaintiff has chosen to sue for breach of contract rather than negligence.⁹²

b. Insurance Procurement Agreements. Agreements to procure insurance are generally enforceable in New Mexico.⁹³ “Covenants as to insurance follow the same rules of construction as other covenants in contracts.”⁹⁴ The New Mexico Supreme Court has held that, where a lessee agrees to procure insurance coverage for the lessor and fails to do so, the lessee will be held liable for that failure.⁹⁵ Additionally, an insurance agent or broker who agrees to procure insurance and then erroneously fails to do so may be held liable for damages resulting from that failure.⁹⁶

c. Duty to Defend. Where the allegations of an injured party’s complaint come within the scope of the insured party’s policy coverage, the insurer has an obligation to defend the insured, regardless of the insured’s ultimate liability.⁹⁷ This is true even where the complaint is unclear, as long as the complaint alleges facts that “tend to show an occurrence within the coverage.”⁹⁸ “The obligation to defend is distinct from the obligation to indemnify,” and the obligation to defend must be found in a policy clause promising to defend against liability.⁹⁹ Only if the allegations fall completely

⁸⁹ *Id.* ¶ 36.

⁹⁰ *Id.* ¶ 32.

⁹¹ *Id.* ¶ 39.

⁹² See *Lopez v. Am. Baler Co.*, 2013 U.S. Dist. LEXIS 128348, at *44, 2013 WL 4782155 (D.N.M. Aug. 12, 2013) (stating “when a plaintiff chooses to sue under breach of contract, a defendant should be able to seek proportional indemnification for that percentage of fault attributable to another” (internal quotations omitted)).

⁹³ See *Krieger v. Wilson Corp.*, 2006-NMCA-034, ¶ 27, 139 N.M. 274, 131 P.3d 661 (where a lessee agreed to procure insurance covering the lessor, the lessor’s claim against the lessee was “generally actionable”).

⁹⁴ *Lommori v. Milner Hotels, Inc.*, 1957-NMSC-089, ¶ 29, 63 N.M. 342, 319 P.2d 949 (citation omitted).

⁹⁵ *Id.* ¶ 30.

⁹⁶ *Sanchez v. Martinez*, 1982-NMCA-168, ¶ 14, 99 N.M. 66, 653 P.2d 897.

⁹⁷ *Windham v. L.C.I.2, Inc.*, 2012-NMCA-001, ¶ 17, 268 P.3d 528 (quoting *Am. Emp’rs Ins. Co. v. Cont’l Cas. Co.*, 1973 -NMSC- 073, ¶ 4, 85 N.M. 346, 512 P.2d 674).

⁹⁸ *Id.*

⁹⁹ *Fed. Ins. Co. v. Century Fed. Sav. & Loan Ass’n*, 1992-NMSC-009, ¶ 29, 113 N.M. 162, 824 P.2d 302 (citing *Ins. Co. of N. Am. v. Wylie Corp.*, 1987-NMSC-011, ¶ 18, 105 N.M. 406, 733 P.2d 854).

outside of the scope of the insurance policy does the insurer have no duty to defend.¹⁰⁰

VI. Damages

- a. **Compensatory Damages.** Compensatory, or actual, damages are damages designed to remedy an injury.¹⁰¹ Compensatory damages are “the measure of a loss’ and are awarded to place the plaintiff in a position that he or she would have been in had he or she not suffered the wrong complained of.”¹⁰² New Mexico courts have noted that “it is never the purpose of compensatory damages to allow a plaintiff to profit from his or her loss.”¹⁰³ Rather, the purpose is to make the plaintiff whole.¹⁰⁴

1. Calculation of Damages

1. **Past and Future Medical Bills.** Past and future medical bills are available in personal injury actions in New Mexico.¹⁰⁵
2. **Loss of Enjoyment of Life.** The loss of the enjoyment of life, experienced as a result of the injury, may be recovered in personal injury actions in New Mexico.¹⁰⁶ No fixed standard currently exists for determining these damages, and the jury may be instructed to decide a reasonable amount to compensate the plaintiff.¹⁰⁷
3. **Loss of Services of Spouse.** The reasonable value of services provided by a husband or wife, which a family has been deprived of and that the family is reasonably certain to be deprived of in the future may be recovered in personal injury actions in New Mexico.¹⁰⁸

¹⁰⁰ *Guar. Nat’l Ins. Co. v. C de Baca*, 1995-NMCA-130, ¶ 14, 120 N.M. 806, 907 P.2d 210 (citing *Bernalillo Cnty. Deputy Sheriffs Ass’n v. Cnty. of Bernalillo*, 1992-NMSC-065, ¶ 8, 114 N.M. 695, 845 P.2d 789).

¹⁰¹ *Faber v. King*, 2015-NMSC-015, ¶ 19, 348 P.3d 173.

¹⁰² *Id.* ¶ 20 (quoting *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 11, 117 N.M. 761, 877 P.2d 567).

¹⁰³ *Maese v. Garrett*, 2014-NMCA-072, ¶ 14, 329 P.3d 713.

¹⁰⁴ *See Topmiller v. Cain*, 1983-NMCA-005, ¶ 18, 99 N.M. 311, 657 P.2d 638.

¹⁰⁵ UJI 13-1804 NMRA.

¹⁰⁶ UJI 13-1807A NMRA.

¹⁰⁷ *Id.*

¹⁰⁸ UJI 13-1810 NMRA.

4. **Increased Risk of harm.** Increased risk of harm may be compensable under New Mexico law.¹⁰⁹
5. **Disfigurement.** Disfigurement damages may be recovered in personal injury actions in New Mexico.¹¹⁰
6. **Disability.** Disability damages may be recovered in personal injury actions in New Mexico.¹¹¹
7. **Past and Future Pain and Suffering.** Past pain and suffering may be recovered in personal injury actions in New Mexico.¹¹²
8. **Loss of Society.** Loss of society (referred to as “loss of consortium”) damages may be recovered in personal injury actions in New Mexico.¹¹³
9. **Lost Income, Wages, Earnings.** Lost income, wages and earnings may be recovered in personal injury actions in New Mexico.¹¹⁴ This can include the present cash value of future earnings which are reasonably certain to be lost.¹¹⁵
10. **Non-medical Expenses.** Non-medical expenses, which have been incurred as the result of the injury may be recovered in personal injury actions in New Mexico.¹¹⁶
11. **Damages to Personal Property.** Damage to personal property is measured as the smaller value of either (1) “the reasonable expense of necessary repairs to the property which was damaged,” or (2) “the difference between the fair market value

¹⁰⁹ See *Madrid v. Lincoln Cnty. Med. Ctr.*, 1996-NMSC-049, ¶ 31, 122 N.M. 269, 923 P.2d 1154 (allowing a negligent infliction of emotional distress claim after an employee was exposed to what she initially thought was HIV-exposed blood even though it was later learned the blood was not HIV-exposed).

¹¹⁰ UJI 13-1806 NMRA.

¹¹¹ See *id.*

¹¹² UJI 13-1807 NMRA.

¹¹³ UJI 13-1810A NMRA.

¹¹⁴ UJI 13-1803 NMRA.

¹¹⁵ *Id.*

¹¹⁶ UJI 13-1805 NMRA.

of the damaged personal property immediately before the occurrence and its fair market value immediately after the occurrence.”¹¹⁷ Depreciation, if any, may be awarded to a plaintiff when damages are based on the reasonable expense of repairs.¹¹⁸

12. Loss of Use of Personal Property. Damages for the loss of use of cars and other personal property are recoverable in New Mexico. However, the New Mexico courts limit damages to either total loss of a vehicle or repair costs plus loss of use.¹¹⁹

13. Damages to Real Property. Damages to real property are generally determined in New Mexico by the difference between the value of the property immediately before the incident and the value of the property immediately after the incident.¹²⁰

14. Repair and Remediation of Real Property. Damages for repairs and remediation to real property may be awarded in New Mexico.¹²¹

15. Aggravation of Preexisting Condition. Damages for the aggravation of a preexisting condition may be awarded. However, damages for the underlying preexisting ailment or condition may not be awarded.¹²²

16. Loss of Earning Capacity by a Minor. Damages may be awarded for the present cash value of earning capacity reasonably certain to be lost in the future after the plaintiff has reached the age of eighteen.¹²³

¹¹⁷ *State v. Barreras*, 2007-NMCA-067, ¶¶ 5-7, 141 N.M. 653, 159 P.3d 1138; UJI 13-1813 NMRA; UJI 13-1814 NMRA.

¹¹⁸ UJI 13-1815 NMRA.

¹¹⁹ *Cress v. Scott*, 1994-NMSC-008, ¶ 6, 117 N.M. 3, 868 P.2d 648.

¹²⁰ UJI 13-1819 NMRA.

¹²¹ *McNeill v. Burlington Res. Oil & Gas Co.*, 2008-NMSC-022, ¶ 38, 143 N.M. 740, 182 P.3d 121.

¹²² UJI 13-1808 NMRA.

¹²³ UJI 13-1809 NMRA.

b. Collateral Source.

1. **General Principal.** The collateral source rule is an exception to the general rule that a party may not recover twice for the same injury.¹²⁴ “The classic statement of the collateral source rule is that [c]ompensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer. In other words, if a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must *still* pay damages, even if this means that the plaintiff recovers twice.”¹²⁵
2. **Applicability.** New Mexico has adopted a collateral source rule for calculation of damages in civil litigation.¹²⁶ The collateral source rule bars evidence that a plaintiff received compensation or benefits for his or her injury from collateral sources such as insurance.¹²⁷ The rule was later limited to “situations where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff.”¹²⁸ The collateral source rule does not apply if the benefits derive from the defendant himself or a source identified with him, such as insurance policies procured and paid for by the defendant.¹²⁹

- c. **Medical Damages.** In personal injury actions, a prevailing plaintiff may be entitled to “[t]he reasonable expense of necessary medical care, treatment and services received . . . and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.”¹³⁰ Medical bills are generally admissible under New Mexico’s Rules of Evidence; however, testimony is required regarding their reasonableness and necessity.¹³¹ It is an open question under New Mexico

¹²⁴ *Sunnyland Farms, Inc. v. Cent. N.M. Elec. Coop., Inc.*, 2013-NMSC-017, ¶¶ 47-48, 301 P.3d 387.

¹²⁵ *Id.* ¶ 48 (internal quotation marks and citation omitted) (emphasis and alteration in original).

¹²⁶ *See McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 1990-NMSC-093, ¶ 17, 110 N.M. 697, 799 P.2d 133.

¹²⁷ *Id.*

¹²⁸ *See Summit Props., Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-090, ¶ 46, 138 N.M. 208, 118 P.3d 716 (citing *Sanchez v. Clayton*, 1994-NMSC-064, ¶ 10, 117 N.M. 761, 877 P.2d 567).

¹²⁹ *Yardman v. San Juan Downs, Inc.*, 1995-NMCA-106, ¶ 41, 120 N.M. 751, 906 P.2d 742.

¹³⁰ UJI 13-1804 NMRA.

¹³¹ *See Romero v. Mervyn's*, 1989-NMSC-081, ¶¶ 38-40, 109 N.M. 249, 784 P.2d 992.

state court whether a plaintiff can recover amounts billed but written off by medical providers, however there is support for the argument that a plaintiff is entitled to recover such amounts.¹³² The District Court for the District of New Mexico has stated that the collateral source rule supports that the trier of fact's determination as to the reasonable value of a plaintiff's health care expenses should be based on the amount billed rather than paid.¹³³

d. **Nominal Damages.** "Nominal damages are a trivial sum of money, usually one cent or one dollar, awarded to a party who has established a right to recover but has not established that he is entitled to compensatory damages."¹³⁴ Nominal damages are available in actions for intentional torts, but are only available in negligence actions upon proof of actual damages.¹³⁵ A court may award nominal damages where the extent of the loss has not been shown, as a judicial declaration where a right has been violated.¹³⁶

e. **Punitive Damages.**

1. **Standard.** Punitive damages are available when the plaintiff has proven the defendant's conduct to be malicious, willful, reckless, wanton, fraudulent or in bad faith.¹³⁷ In a negligence action, proof of actual damages is a prerequisite to an award of punitive damages.¹³⁸

2. **Insurability.** The New Mexico Supreme Court has determined that punitive damages are "as much a part of the potential award under the uninsured motorist statute as damages for bodily injury," and held that punitive damages cannot be contracted away.¹³⁹

¹³² See *Pipkins v TA Operating Corp.*, 466 F.Supp.2d 1255, 1261 (D.N.M. 2006) ("Although New Mexico courts have not addressed the collateral source rule's application to the gratuitous provision of medical services, the legal and policy underpinnings of New Mexico courts' approach to the collateral source rule strongly suggest that New Mexico would apply the collateral source rule's application to the gratuitous provision of medical services.")

¹³³ *Felts v. Board of County Commissioners of Valencia County*, 2017 WL 3267742, *5 (D.N.M.) ("Finally, the Court agrees with Plaintiff that the jury's determination of the reasonable value of Plaintiff's health care expenses should be based on a presentation of the amount billed, rather than the amount paid by Medicaid on Plaintiff's behalf.")

¹³⁴ UJI 13-1832 NMRA; see also *Faber*, 2015-NMSC-015, ¶ 20.

¹³⁵ *Encinias*, 2013-NMSC-045, ¶¶ 21-22.

¹³⁶ *Faber*, 2015-NMSC-015, ¶ 38 (quoting *Ruiz v. Varan*, 1990-NMSC-081, ¶ 17, 110 N.M. 478, 797 P.2d 267).

¹³⁷ UJI 13-1827 NMRA.

¹³⁸ *Encinias*, 2013-NMSC-045, ¶ 21.

¹³⁹ *Stinbrink v. Farmers Ins. Co.*, 1990-NMSC-108, ¶ 5, 111 N.M. 179, 803 P.2d 664.

3. **Caps.** There are no caps on punitive damages in personal injury actions in New Mexico, other than constitutional limitations.¹⁴⁰

f. Wrongful Death and Survivorship Actions

1. Wrongful Death Actions

1. **Standard.** If the decedent would have been entitled to damages had the injury not resulted in death, the personal representative of the decedent's estate may bring a wrongful death action in New Mexico, and a jury may award "fair and just" compensatory, punitive, and nominal damages to the decedent's surviving beneficiaries.¹⁴¹ Damages will be determined by evaluating the "the worth of the life of the decedent."¹⁴²

2. **Elements of damages.** Pecuniary injury suffered by the survivors is a factor to be considered,¹⁴³ but jurors may still award compensatory or punitive damages absent pecuniary loss. In determining a "fair and just" award, a jury may award damages relating to:
 - medical care and treatment;
 - funeral and burial;
 - pain and suffering experienced by the deceased; between the time of injury and death;
 - lost earnings, lost earning capacity, and the value of the lost household services of the deceased, "considering the deceased's age, earning capacity, health, habits, and life expectancy;"
 - the value of the deceased's life apart from earning capacity;
 - emotional distress to family members caused by loss of companionship and guidance;

¹⁴⁰ See generally UJI 13-1827 NMRA.

¹⁴¹ See NMSA 1978, § 41-2-1 & 3 (2001).

¹⁴² *Estate of Gilmore*, 1997-NMCA-103, ¶ 4, 124 N.M. 119, 946 P.2d 1130 (quoting *Stang v. Hertz Corp.*, 1970-NMSC-048, ¶ 7, 81 N.M. 348, 467 P.2d 14) (internal quotation marks omitted).

¹⁴³ *Romero v. Byers*, 1994-NMSC-031, ¶¶17-18, 117 N.M. 422, 872 P.2d 840.

- the loss of guidance and counselling to minor children; and
- mitigating or aggravating circumstances.¹⁴⁴

2. Survivorship Actions. Actions for personal injuries are not extinguished by a decedent’s unrelated death.¹⁴⁵ The personal representative of a decedent’s estate has “the same standing to sue as the decedent had immediately prior to death”¹⁴⁶ and “is authorized to prosecute claims for the protection of the estate.”¹⁴⁷ Similarly, the death of the party responsible for the injury does not extinguish the plaintiff’s claim.¹⁴⁸

This Compendium contains a brief overview of certain laws concerning various litigation and legal topics facing retailers. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.

¹⁴⁴ See NMSA 1978 Section 41-2-3 and accompanying annotations.

¹⁴⁵ *Rodgers v. Ferguson*, 1976-NMCA-098, ¶ 26, 89 N.M. 688, 556 P.2d 844.

¹⁴⁶ *Martinez v. Segovia*, 2003-NMCA-023, ¶ 17, 133 N.M. 240, 62 P.3d 331 (citing NMSA 1978, § 45-3-703(E) (1975)).

¹⁴⁷ *Id.* (citing NMSA 1978, § 45-3-715(A)(22) (1995)).

¹⁴⁸ NMSA 1978, § 37-2-1 (1941) (“[T]he cause of action for personal injuries[] shall survive the death of the party responsible therefor.”).